Single Bench

IN THE HIGH COURT OF JUDICATURE CHHATTISGARH AT BILASPUR

W.P.NO. 956 / 2005

Petitioner : Rishi Dikshit, S/o Shri G.S.Dikshit, Aged about 28 years, R/o Bada Chowk, Shyam Nagar Raipur, Dist. Raipur (C.G.)

Versus

Respondents :

1. State of Chhattisgarh, Through the Secretary, Department of Commercial Taxes (Excise), D.K.S. Bhawan, Mantralaya, Raipur (C.G.)

2. Excise Commissioner, State of Chhattisgarh, Raipur (C.G.)

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PETITION UNDER ARTICLES 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF APPROPRIATE WRITS OF MANDAMUS AND CERTIORARI AND FOR OTHER SUITABLE WRITS AND DIRECTIONS

(260)

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR
(Division Bench)

CORAM : Hon'ble Shri A.K. Patnaik, CJ
& Hon'ble Shri L.C. Bhadoo, J.

WRIT PETITION NO. 956 OF 2005

Rishi Dikshit

Versus

State of Chhattisgarh & Another

ORDER
(31st of March 2005)

A.K. Patnaik, CJ: The following Order of the Court was passed by

The petitioner is a business man and deals in liquor business. The State of Chhattisgarh was formed with effect from 01.11.2000 and the Madhya Pradesh Excise Act, 1915 was adapted under the provisions of the Madhya Pradesh Re-organization Act so as to make it applicable with modifications in the State of Chhattisgarh and on such adaptation, the Act has been renamed as Chhattisgarh Excise Act, 1915 *(for short "the Act")*. Section 62(1) of the Act provides that the State Government may make rules for the purpose of carrying out the provisions of the Act and Section 62(2) provides that the State Government may in particular, and without prejudice to the generality of the provisions of Section 62(1) make rules on the matters specified in Clauses (a) to (n) thereof. In exercise of this power under Section 62(1) read with Clauses (d) (d-1), (e), (f), (g) and Clause (b) of Section 18(1) of the Act, the State Government by a notification dated 15.03.2002 made the Chhattisgarh Excise Settlement of Licences for retail sale of country / foreign liquor Rules, 2002 (for short "the Rules 2002"). Thereafter, the Excise Commissioner, State of Chhattisgarh issued a circular dated 14.02.2005 to all the Collectors of the State of Chhattisgarh regarding the rules for settlement of licences for retail sale of country / foreign liquor shops in the State of Chhattisgarh for the year 2005-06. Pursuant to the said circular applications were invited from intending applicants for settlement of licences for retail sale of country liquor / foreign liquor in the State of Chhattisgarh for the year

2005-06 and the petitioner amongst others applied for the group Rasera, District Raipur vide their application No.01250026 dated 26.02.2005 for licence of retail sale of country liquor / foreign liquor. After receipt of the applications, the respondents have proceeded to select the licensees. The petitioner has filed this writ petition challenging the circular dated 14.02.2005 issued by the Excise Commissioner, State of Chhattisgarh and praying that the impugned circular be quashed and suitable directions be given to the respondents with regard to selection of the retail licensees of country / foreign liquor shops in the State of Chhattisgarh.

2. At the hearing, Mr. Ravindra Shrivastava along with Mr. P. Diwaker, Sr. Advocates submitted that under Section 62(2) of the Act, the State Government has made the Rules 2002 and Rule 9 of the Rules 2002 stipulates the eligibility conditions of the applicant and these are that the applicant should be a citizen of India or a partnership firm whose partners are citizen of India; should be above 21 years of age; should not be a defaulter / or should not be black listed or debarred from holding an excise licence under the provisions of the Rules made under the Act, possesses or has an arrangement for taking on rent suitable premises in the concerned locality for opening the shops in accordance with the Rules; possesses good moral character and has no criminal background and has not been convicted of any offence punishable under the Act or Narcotic Drugs and Psychotropic Substances Act, 1985 or any other law for the time being in force and that no government dues are outstanding against him. But the format of the application as prescribed by the Excise Commissioner, State of Chhattisgarh in the impugned circular does not contain any column requiring the applicant to furnish information to show that he satisfies the aforesaid eligibility conditions as prescribed under Rule 9 of the Rules 2002. They submitted that Rule 11 of Rules 2002 provides for selection of licensee from amongst such eligible or suitable applicants but unless the applications show that the applicants satisfied the eligibility conditions as prescribed in Rule 9 of the Rules 2002, the Committee entrusted under Rule 11 to select the licensee will not be able to know as to whether the applicant is eligible or suitable for grant of licence for retail sale of country or foreign liquor. They argued that the provisions in Rule 9 provide the eligibility conditions of the applicant, and are, therefore, mandatory and cannot be dispensed with by the Excise

Commissioner, State of Chhattisgarh and yet it appears from the impugned circular as well as the prescribed format of the application in which the applicants are required to apply that these mandatory provisions in Rule 9 of the Rules 2002 have been dispensed with. They argued that since there has been a breach of the mandatory requirements of the Rules 2002 by the impugned circular and the applications filed by the applicants do not contain the information for the purpose of determining as to whether the applicants are eligible or suitable, the entire exercise under taken by the Department in selecting the licensees has to be declared by the Court as illegal and contrary to the Rules 2002.

3. In reply to the aforesaid submissions made by learned counsel for the petitioner, Mr. Prashant Mishra, learned Additional Advocate General submitted that a reading of Rule 9 would show that the applicant has to fulfill the conditions mentioned therein "for obtaining licence for shops / group of shops of the country liquor / foreign liquor" and, therefore, it is only after a selection is made from amongst the applicants in accordance with Rule 11 of the Rule 2002 that the selected candidates would have to satisfy the eligibility conditions as mentioned in Rule 9 of Rules 2002. He further submitted that the impugned circular was issued by the Excise Commissioner, State of Chhattisgarh pursuant to the decision taken by the State Government to amend the Rules 2002 and the circular was an internal circular issued to the Collectors of different districts of the State of Chhattisgarh. He produced before us a copy of the notification dated 22.03.2005 of the State Government of Chhattisgarh by which the provisions of Rule 8 of Rule 2002 have been amended. He further argued that since the petitioner has submitted an application in the format as prescribed by the Excise Commissioner, State of Chhattisgarh and has participated in the process of selection of the licensees, he has acquiesced in the entire procedure of the selection as laid down in the impugned circular of the Excise Commissioner, State of Chhattisgarh and at this stage he cannot challenge the said procedure as contrary to the Rules 2002. In support of his submission, he cited the judgment of Supreme Court in the case of **Nain Sukh Das v. U.P. State** reported in **AIR 1953 SC 384**, wherein the Supreme Court has held that the petitioners acquiesced in the elections being conducted under the old system of separate electorates and felt no discrimination having been

practised against them could not complain of infringement of their fundamental rights under Articles 15(1) and 14 of the Constitution. Mr. Mishra further submitted that it is now well settled by the Courts that the Court would be slow in interfering in matters relating to the policy of the State Government regarding sale of foreign liquor / country liquor. In particular, he cited decisions of the Supreme Court in the case of **State of Orissa vs. Hari Narayan Jaiswal** reported in **AIR 1972 SC 1816**, and in the case of **Khoday Distilleries Ltd. vs. State of Karnataka** reported in **(1995) 1 SCC 574**. He submitted that in this case also the Courts should not interfere with the policy decision of the State Government as incorporated in the impugned circular of the Excise Commissioner, State of Chhattisgarh.

4. Mr. Ravi Shankar Prasad, Sr. Advocate assisted by Mr. Abhishek Sinha, learned counsel appearing for the interveners similarly cited the decision of the Supreme Court in the case of **State of Madhya Pradesh and Others vs. Nandlal Jaiswal and Others** reported in **(1986) 4 SCC 566** in which the Supreme Court has observed that while considering the applicability of Article 14 in the case where licence for manufacture and sale of liquor is being granted by the State Government, the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor having regard to the nature of the trade or business. He also relied on the Constitution Bench decision of the Supreme Court in the **Khoday Distilleries vs. State of Karnataka and Others** (supra) in which the Supreme Court while summarizing the law relating to the liquor business held that the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees and the State can impose limitations and restrictions on the trade or business in such liquor and such restrictions or limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and / or to preserving to itself the right to sell licences to do trade or business in the same. Mr. Prasad argued that in view of the aforesaid law laid down by the Supreme Court, the decision of the State Government as to how it will select the retail licensees of country / foreign liquor in the State of Chhattisgarh should be

left to the State and should not be interfered with by the Court in exercise of its power of judicial review. Regarding Rule 9 of the Rules 2002, he argued that that the requirements in Clauses (a)(b) and (c) of the said Rule 9 that the applicant should be a citizen of India or a partnership firm whose partners are citizens of India; that he should be above 21 years of age; and that he should not be a defaulter / or should not be black listed or debarred from holding an excise licence under the provisions of the Rules made under the Act are eligibility conditions and are mandatory in nature and every applicant has to satisfy the said requirements, but the applicant need not file an affidavit as required in Rule 9 (d) of Rules 2002 to show that he possesses or has an arrangement for taking on rent suitable premises in the concerned locality for opening the shops in accordance with the Rules or that he possesses good moral character or has no criminal back ground or that no government dues are outstanding against him. Such an affidavit, according to Mr. Prasad, can be filed by the applicant after he is selected in accordance with the Rule 11 of the Rules 2002. He cited the decision of the Supreme Court in the case of **Rajendra Singh vs. State of M.P.** reported in **(1996) 5 SCC 460** for the proposition that every breach of statutory provision does not furnish a good ground for the Court to interfere and if a statutory provision is only a directory one and not a mandatory one and there is substantial compliance with the directory provision, the Court will not interfere merely because there is some reach in the provisions of the Rules. He submitted that in the case of **Rajendra Singh** (supra) the Supreme Court has further held that wherever a complaint of violation of mandatory provision is made, the Court should inquire as to whose interest the provision is conceived and if it is not conceived in the interest of the public, the question of waiver and / or acquiescence may arise subject of course to the pleadings of the parties and it is necessary for the Court to keep these considerations in mind while deciding whether or not to interfere in the decision under Article 226 or in a suit. Mr. Prasad further submitted that in this case, since the petitioner has acquiesced by submitting an application in the format as prescribed by the Excise Commissioner, State of Chhattisgarh under the impugned circular, he cannot, at this stage be allowed to challenge that Rule 9 of Rules 2002 has been dispensed with by the Excise Commissioner, State of Chhattisgarh in the impugned circular and the format does not contain columns in which the applicant is required to

furnish information to show that he satisfies the eligibility requirements as prescribed in Rule 9 of the Rules 2002. Mr. Sanjay K. Agrawal, learned counsel for the different intervener adopted the aforesaid arguments of Mr. Prasad.

5. Rules 8, 9, 10 and 11 of the Rules 2002 which are relevant for this case, are extracted herein below:

"8. **Procedure for grant of licence –**

(a) Whenever a new licence is proposed to be granted in an area or locality, the licensing authority shall invite the applications for this purpose after giving wide publicity through daily newspapers having circulation in that area.

(b) A list of shops of country / foreign liquor for which the licensing authority proposes to grant licence shall be exhibited along with shopwise licence fee minimum monthwise guaranteed quantity, security amount, and annual quantity in office of Collector, Tehsil, District Excise Officer / Asstt. Commissioner excise and Deputy Commissioner Excise (Flying squad).

(c) Application for grant of licence with application fee shall be submitted in the prescribed form as appended to these rules as annexure 4.

(d) The last date to be fixed for the receipt of application shall not be earlier than ten days with effect from the date of publication of the advertisement in the newspaper.

9. **Eligibility Conditions for applicant** – The applicant has to fulfil the following conditions for obtaining the licence for shop/Group of shops of Country/foreign liquor.

(a) Should be a citizen of India or a partnership firm whose partners are citizen of India. No change in partnership shall be allowed after settlement of shop(s)/group of shops except with the permission of the Excise Commissioner.

(b) Should be above 21 years of age.

(c) Should not be a defaulter/blacklisted or debarred from holding an excise licence under the provisions of any rules made under the Act.

(d) Has to submit an affidavit duly verified by public notary as proof of the following, namely-

(1) That he possesses or has an arrangement for taking on rent suitable premises in that locality for opening the shops in accordance with the rules.

(2) That he possesses good moral character and have no criminal background and have not been convicted of any offence punishable under the Act or Narcotic Drugs and Psychotropic Substances Act, 1985 or any other law for the time being in force or any other cognizable and non-bailable offence.

(3) That in case he is selected as licensee he will furnish a certificate, issued by Superintendent of Police of the district of which he is the resident, showing that he as well as his family members possess good moral character and have no criminal background or criminal record, within thirty days of grant of licence.

(4) That he shall not employ any salesman or representative who has criminal background as mentioned in clause (iii) or who suffer from any infectious or contagious disease or is below 21 years of age or a woman.

(5) That no government dues are outstanding against him.

10. **District level committee for licensing-** There shall be a district level committee for selection of licensees for sale of country / foreign liquor. The committee shall consists of the –

(i) The Collector of the District	Chairman
(ii) The District Excise Officer/ Asstt. Commissioner of the District	Member Secretary

11. **Selection of Licensee-**

(a) The member secretary of the committee shall prepare a list of all applicants with summary report to be put up before the district level committee.

(b) The said committee shall select licensees from the list of applicants. In case more than one applicants are found suitable for any particular group of shops the committee shall select the licensee for such group of shops by lottery (c). In case the selected applicant does not deposit the required amount according to rule 13 and does not fulfil the prescribed formalities or is unable to arrange suitable premises for the shops within stipulated period, the licensing authority shall cancel the allotment and take steps for resettlement of the shops / group of shops.

(c) In case there is no application for a particular group of shops or no applicant is found suitable for a group of shops, the licensing authority shall take immediate steps for resettlement as per procedure laid down in rule 8.

(d) Licensing authority shall have the right to reject application received for a group of shops without assigning any reason.

(e) The person in whose favour licence is granted shall be bound by the terms and conditions of licence issued under rule 3(b)."

6. Rule 8 extracted above provides for procedure for grant of licence. Clause (c) of Rule 8 as it stood before its amendment by notification dated 22.03.2005 provided that the application for grant of licence with application fee shall be submitted in prescribed form as appended to the Rules as annexure 4. The said Clause (c) has now been substituted by new Clause (c) by the amendment under the notification dated 22.03.2005 which now reads as hereunder:

"(C) The application form under rule-6 along with prescribed application fees shall be submitted to the Licensing Authority of the concerned district within prescribed date & time for grant of license for retail shop / group of country/foreign liquor in the proforma prescribed by the Excise Commissioner."

By the aforesaid amendment by notification dated 22.03.2005 after Clause (c), a new clause (C-1) has been added which reads as follows:

"(C-1) The first, second & third applicant selected for retail shop / group of country / foreign liquor by the selection committee after lottery drawn by computer must submit affidavit verified by the Notary in the prescribed proforma the next day during office hours."

By the notification dated 22.03.2005 no amendment has been made whatsoever to Rule 9 of the Rules 2002. Hence the position before the amendment by the notification dated 22.03.2005 and after the amendment by the notification dated 22.03.2005 as regards Rule 9 remains the same.

7. A plain reading of Rule 9 quoted above would show that the applicant "has" to fulfil the conditions mentioned therein for obtaining licence for shop / group of shops of country / foreign liquor. Therefore, the applicant has to be a citizen of India or a partnership firm whose partners are citizens of India; he has to be above 21 years of age; he should not be a defaulter or a person black listed or debarred from holding an excise licence under the provisions of the Rules made under the Act and he has to submit an affidavit furnishing the information as required under Rule 9(d) of the Rules 2002 namely that he possesses or has an arrangement for taking on rent suitable premises in the concerned locality, he possesses good moral character and has no criminal background and has not been convicted of any offence under the law and he has no government dues outstanding against him. If we accept the contention of Mr. Mishra, learned Additional Advocate General that all these conditions may be fulfilled by the applicant as provided in Clauses (a), (b), (c) and (d) in Rule 9 after the applicant is selected, then the consequence would be that the District Level Committee formed in accordance with Rule 10 will

not be able to select or find out as to who amongst the applicants are eligible or suitable for grant of licences for country liquor or foreign liquor shops. It is, therefore, necessary that before the process of selection is undertaken under Rule 11 information should be available with the District Level Committee as to whether the applicants fulfil the eligibility conditions in Clause (a), (b), (c) and (d) of Rule 9. Moreover, the expression "eligibility conditions for applicant" by itself implies that the conditions have to be satisfied by the applicant for being eligible for consideration under Rule 11. For these reasons we are of the view that the provisions of Rule 9 of the Rules 2002 laying down the eligibility conditions for the applicant are mandatory provisions and are not directory provisions.

8. Section 62 (2)(e) of the Act provides that the State may make rules regulating inter alia the persons or classes of persons to whom, licences for the wholesale or retail vend of any intoxicant may be granted. It is in exercise of such power under Section 62(e) that Rule 9 of the Rules 2002 has been made by the State of Chhattisgarh stating therein that only applicants who satisfy the eligibility conditions as laid down in the said Rule 9 are the persons or classes of persons to whom licence for retail sale of country or foreign liquor can be granted and who can apply for such licence. Obviously these provisions of Section 62 (2) (e) of the Act and Rule 9 of the Rules 2002 have been made not for the benefit of any individual but in the interest of the public because the object of these provisions is that a person who does not satisfy the conditions as laid down in Rule 9 should not be allowed to hold a licence for retail sale of country or foreign liquor.

9. If the provisions of Rule 9 of the Rules 2002 are mandatory and have been made in the interest of the public, breach of the provisions of Rule 9 will call for interference by the Court and the fact that the petitioner has submitted an application in the prescribed format as laid down in the impugned circular of the Excise Commissioner will not stand in the way of the Court interfering in the matter and issuing appropriate directions to the State for compliance with the provisions of Rule 9 of the Rules 2002 as per the law laid down in the case of **Rajendra Singh Vs. State of M.P.** (Supra). The relevant portion of the said judgment of the Supreme Court in the case of Rajendra Singh is quoted here in below:

"While examining complaints of violation of statutory rules and conditions, it must be remembered that violation of each and every provision does not furnish a ground for the court to interfere. The provision may be a directory one or a mandatory one. In the case of directory provisions, substantial compliance would be enough. Unless it is established that violation of a directory provisions has resulted in loss and/or prejudice to the party, no interference is warranted. Even in the case of violation of a mandatory provision, interference does not follow as a matter of course. A mandatory provision conceived in the interest of a party can be waived by that party, whereas a mandatory provision conceived in the interest of the public cannot be waived by him. In other words, wherever a complaint of violation of a mandatory provision is made, the Court should enquire – in whose interest is the provision conceived. If is not conceived in the interest of the public, question of waiver and/or acquiescence may arise – subject, of course, to the pleadings of the parties." (Emphasis supplied).

10. Coming now to facts of this case, we find that no scrutiny has been made by the authorities for the purpose of finding out as to whether the applicants satisfied the eligibility conditions as mentioned in Rule 9 of the Rules 2002. On 30/03/2005 we passed an order in the connected Writ Petition No.740 of 2005 calling upon the State of Chhattisgarh to file an affidavit clarifying certain matters and pursuant to the said order an affidavit of the Deputy Commissioner, Excise, Raipur, Chhattisgarh has been filed on behalf of the State of Chhattisgarh in the connected Writ Petition Nop.740 of 2005. Paragraphs 3 and 4 of the said affidavit are quoted herein below: -

"3. That on receipt of applications the names of applicants were entered in the register. In Bilaspur District names containing the applicants have been complied in about 200 registers. The Member Secretary prepared a list of applicants group-wise and submitted a summary report before the District Level Committee in form of compiling the

defective applications. On the basis of report the District Level Committee considered the applications to assess the suitability of the applicants. While assessing the suitability of the applicants the District Level Committee rejected applications group-wise whose applications were not found suitable for the various reasons including the following:

(a) Where the person has applied for more than one groups;

(b) A person whose name is in the black-list/defaulter's list in any of the District of the State of Chhattisgarh;

(c) The application did not at all contain signatures either on the specified place or just below the declaration;

(d) Where the Bank Draft was not attached;

(e) Where signatures were made by any person other than the applicant;

(f) Where the photograph of the candidate has not been affixed;

(g) Where the banker's cheque/draft/cash order did not contain the signatures of the issuing authority;

(h) Where the photograph has not been attested by a Gazetted officer;

(i) Where the application contains wrong information about the minimum guarantee and licence fees;

(j) Where the application was otherwise lacking in any respect prescribed in the proforma.

4. That all such applications/applicants who were not found suitable for any of the defect as mentioned above, were treated as suitable and since the number of suitable applicants were more than one in all the groups throughout the State, the District Level Committee decided to select the licensee by draw of lots."

It would be clear from the aforesaid paragraphs 3 and 4 of the affidavit filed on behalf of the State of Chhattisgarh in the connected Writ Petition No.740 of 2005 that before the selection was undertaken under Rule 11 of the Rules 2002 no scrutiny was made as to whether the applicants satisfied the eligibility conditions as mentioned in Rule 9 of the Rules 2002 except the condition in Clause (c) of Rule 9 that the applicant is not a defaulter. In fact, no such scrutiny could have at all been made by the authorities to find out whether the applicant satisfied the eligibility conditions mentioned in Rule 9 of the Rules 2002 because the applicant was not required to furnish any information in his application as prescribed by the Excise Commissioner, State of Chhattisgarh, from which the authorities could find out as to whether the applicant satisfied the different eligibility conditions mentioned in Rule 9 of the Rules 2002. Consequently, the entire selection carried out pursuant to the applications filed by the applicants in the State of Chhattisgarh for grant of licence for country liquor/foreign liquor shops is illegal and the respondents are directed to carry out a fresh selection in accordance with the Rules 2002.

11. We have been told that about 2,65,000 applications have been filed by different applicants for licence for retail sale of foreign / country liquor shops in the State of Chhattisgarh and along with such applications, the applicants have furnished application fees being fully aware that they have to comply with all the requirements of the Act and the Rules including Rule 9 of the Rules 2002. Therefore, we are not inclined to direct the State Government to refund the application fee and start again by inviting fresh applications and instead we direct respondents 1 and 2 to call for information from all the applicants in a prescribed format which would show that they satisfy all the eligibility conditions in Rule 9 of the Rules 2002 and thereafter, only those applicants who satisfy the eligibility conditions in Rule 9 will be considered in accordance with the provisions of Rule 11 of the Rules 2002.

12. With the aforesaid directions, this writ petition is disposed of. Considering the facts and circumstances of the case, the parties shall bear their own cost.

Sd/-
Chief Justice

Sd/-
L.C. Bhadoo
Judge